Zulkifli bin Md Rodzi v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05–424 OF 2010
APANDI ALI, LINTON ALBERT AND HAMID SULTAN JJCA
22 FEBRUARY 2013

Criminal Procedure — Exhibits — Evidence, expert — Trafficking of 9,9623g cannabis — Conviction of charge and death sentence — Appeal against conviction and sentence — Credibility of chemist and admission of chemist report — Whether chemist report satisfied criteria required under s 399 of the Criminal Procedure Code ('CPC') — Whether chemist report could be admitted under s 45 of the Evidence Act 1950 even if it could not be admitted under s 399 of the CPC — Dangerous Drugs Act 1952 s 39B(1)(a)

Acting upon information received, a party of plainclothes police raided a house. PW4 entered the house and saw a Malay man ('PW6') holding a plastic packet in the living room. PW6 was subjected to a body search but nothing incriminating was found on him. The police proceeded to a room in the house where the appellant was discovered. The appellant was only wearing a pair of pants and attempted to flee the scene but was apprehended. A body search on the appellant did not reveal anything incriminating. However, when asked whether he had kept any contraband, the appellant replied 'ada' and PW4 was quick to caution the appellant under s 37A(1)(b) of the Dangerous Drugs Act 1952 ('DDA'). PW4 observed that there was a wooden cupboard inside the room and proceeded to open it. Inside the cupboard was a black plastic bag with 14 slabs of substances suspected to be cannabis. Also found inside the room was a packet of transparent plastic containing several transparent plastic packets. In the High Court, the appellant was charged under s 39B(1)(a) of the DDA for the offence of trafficking 9,9623g of cannabis. Upon being convicted for the charge, the appellant was sentenced to a death penalty. In the present appeal against his conviction and sentence, the issue raised, inter alia, was the credibility of the 'chemist' ('SP5') and the admission of the chemist report ('exh P13') prepared by SP5. It was argued that exh P13 did not not satisfy the criteria required under s 399 of the Criminal Procedure Code ('CPC'). Despite the objection by the defence, exh P13 was marked as exhibit. The prosecution argued that exh P13 could be admitted pursuant to s 45 of the Evidence Act 1950 ('EA 1950'), even if it could not be admitted under s 399 of the CPC.

Held, allowing the appeal; discharging and acquitting the appellant:

(1) It was clear that SP5 was not a government chemist although his function related to the work of the chemist. In essence, if the report was not from

the government chemist, it is not admissible and has no relevance for purpose of s 399 of the CPC even though it was couched as a report under the said section. The evidence of SP5 and exh P13 had to be expunged. Once it has been expunged the prosecution case would have collapsed at the prosecution stage as the elements of the charge would not have been established and the accused had to be acquitted and discharged (see paras 9 & 11).

(2) Save for the s 399 issue, the trial judge did not misdirect himself. In the instant case, the trial judge had directed his mind to the relevant issues and had acted in accordance with the law with the full cognisance of the maximum evaluation and beyond reasonable doubt test as propounded by case laws (see para 16).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima, pasukan polis yang berpakaian biasa menyerbu sebuah rumah. PW4 memasuki rumah tersebut dan melihat seorang lelaki Melayu ('PW6') memegang paket plastik di ruang tamu. Pemeriksaan badan dilakukan ke atas PW6 tetapi tiada bukti yang menunjukkan bahawa dia bersalah. Polis terus menuju ke arah bilik di dalam rumah tersebut di mana perayu ditemui. Perayu hanya memakai sepasang seluar dan mencuba untuk melarikan diri daripada tempat kejadian tersebut tetapi telah ditangkap. Pemeriksaan badan ke atas perayu tidak menunjukkan apa-apa yang bersalah di atasnya. Walau bagaimanapun, apabila ditanya sama ada di ada menyimpan apa-apa barang seludup, perayu menjawab ada dan PW4 dengan segera memberi amaran kepada perayu di bawah s 37A(1)(b) Akta Dadah Berbahaya 1952 ('ADB'). PW4 mendapati bahawa terdapat almari papan di dalam bilik tersebut dan terus membukanya. Di dalam almari tersebut terdapat beg plastik berwarna hitam dengan 14 papak bahan-bahan yang disyaki kanabis. Juga diperolehi di dalam bilik tersebut paket plastik lutsinar yang mengandungi beberapa paket plastik lutsinar. Di Mahkamah Tinggi, perayu dituduh di bawah s 39B(1)(a) ADB untuk kesalahan mengedar 9,9623g kanabis. Setelah disabitkan untuk tuduhan tersebut, perayu dijatuhkan hukuman mati. Dalam rayuan ini terhadap sabitan dan hukuman, isu yang dibangkitkan, antara lain, adalah kredibiliti 'chemist' ('SP5') dan kemasukan laporan ahli kimia ('eksh P13') yang disediakan oleh SP5. Ia dihujahkan bahawa eksh P13 tidak memenuhi kriteria di bawah s 399 Kanun Acara Jenayah ('KAJ'). Walaupun terdapat bantahan oleh pihak pembelaan, eksh P13 ditandakan sebagai ekshibit. Pihak pendakwaan berhujah bahawa eksh P13 boleh dimasukkan berikutan s 45 Akta Keterangan 1950, walaupun jika ia tidak boleh dimasukkan di bawah s 399 KAJ.

Diputuskan, membenarkan rayuan; melepaskan dan membebaskan perayu:

(1) Adalah jelas bahawa SP5 bukan ahli kimia kerajaan walaupun fungsinya berkaitan dengan kerja ahli kimia. Pada dasarnya, jika laporan bukan

daripada ahli kimia kerajaan, ia tidak boleh diterima dan tidak mempunyai kerelevanan bagi tujuan s 399 KAJ walaupun ia telah diselaraskan sebagai laporan di bawah seksyen tersebut. Keterangan SP5 dan eksh P13 telah dibatalkan. Apabila ia dibatalkan kes pihak pendakwaan boleh gagal di peringkat pendakwaan kerana unsur-unsur tuduhan mungkin tidak dapat dibuktikan dan tertuduh mesti dilepaskan dan dibebaskan (lihat perenggan 9 & 11).

(2) Tanpa mengambil kira isu s 399, hakim bicara tidak tersalah arah dirinya. Dalam kes ini, hakim telah mengarahkan mindanya kepada isu relevan dan bertindak mengikut undang-undang dengan perhatian penuh penilaian maksimum dan ujian melampaui keraguan munasabah seperti yang dikemukakan oleh kes-kes (lihat perenggan 16).]

Notes

For cases on evidence, expert see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2053–2054.

Cases referred to

Baldeo and Ors v Emperor 1940 AIR All 263, HC (refd)
Bhaskaran Pillai (N) v State, (1969) 1 LLJ 642 Ker, HC (refd)
Lee Chee Meng v PP [1992] 1 MLJ 322, SC (refd)
Md Desa bin Hashim v PP [1995] 3 MLJ 350, FC (refd)
Peare Lal v Emperor AIR 1934 All 853, HC (refd)
PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)
PP v Chong Wei Kian [1990] 3 MLJ 165, HC (refd)
PP v Kau Joo Huat [1988] 2 MLJ 91, SC (refd)
PP v Lin Lian Chen [1991] 1 MLJ 316, HC (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
PP v Sandara Margaret Birch [1977] 1 MLJ 129 (refd)
PP v Yap Boon Chang [1992] 2 CLJ 1257, HC (refd)
Yap Chin Chai v PP [2011] 2 MLJ 632; [2010] 4 CLJ 693, CA (refd)

Legislation referred to

Criminal Procedure Code ss 399, 399(2)(c)
Criminal Procedure Code [IND] s 293
Dangerous Drugs Act 1952 ss 37A(1)(b), 39B(1)(a)
Evidence Act 1950 s 45

Appeal from: Suit No 45–15 of 2009 (High Court, Pulau Pinang)

Mohd Ismail bin Mohamed (Ismail, Khoo & Associates) for the appellant.
Samihah bt Rhazali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] This is our judgment in respect of the appellant's appeal against conviction and the sentence of death. This matter came up for hearing on 22 January 2013 and we reserved judgment. This is our judgment.

[2] The appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 and the charge reads as follows:

> Bahawa kamu pada 21hb November 2008, jam lebih kurang 11.30 malam, bertempat di alamat SBH 253 PBA A, Pantai Kamloon, Kepala Batas, di dalam Daerah Seberang Perai Utara, di dalam Negeri Pulau Pinang, telah mengedarkan dadah berbahaya iaitu sejumlah berat 9,9623 gram cannabis dan dengan itu, kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[3] The brief facts of the case have been well articulated by the learned JC in his 34 page judgment. It can be summarised as follows:

THE PROSECUTION CASE

PW4, Insp Muhamad Izham bin Abd Talib testified that acting on information, on 21 November 2008 at about 11.30pm, he and PW8, Insp Mohamad Muzamil bin Esmaon and a team of ten policemen from the Kepala Batas IPD, Seberang Perai Utara raided a house at SBH 253, PBA A, Pantai Kamloon, Kepala Batas, Seberang Perai Utara, Penang. They were all in plain clothes and departed to the scene on their motorcycles. They parked about 30–50 metres away from the scene.

PW4 saw that the premise was a village house made of wood. The door to the house was closed but unlocked. PW4 pushed opened the door and entered the house. PW4 saw a Malay man who was holding a plastic packet in the living room. The Malay man was later identified as Mohammad Fariz bin Ismail ('PW6'). PW4 identified himself as police to PW6 and conducted body search but did not find any incriminating items.

PW4 and three of his team members went to the room at the left side of the house and pushed open the closed door. PW4 saw the appellant inside the room and identified himself as police. The appellant was not wearing any clothes except pants. PW4 testified that when he identified himself as the police, the appellant was seen at unease and tried to flee the scene. PW4 apprehended the appellant and conducted a body search but found nothing incriminating. PW4 asked the appellant whether he had kept any contraband and the appellant replied 'ada'. At this juncture, PW4 cautioned the appellant under s 37A(1)(b) of the Dangerous Drugs Act 1952.

PW4 observed inside the room and saw a few cardboard boxes, a wooden cupboard and a shirt hanging at the side of the cupboard. PW4 opened the cupboard doors and found a black plastic bag on the cupboard's floor. PW4 took out the black plastic bag and opened it. Inside the plastic bag, PW4 found 14 slabs of substances suspected to be *ganja*.

PW4 then searched the room and found a packet of transparent plastic containing several transparent plastic packets.

[4] The petition of appeal says as follows:

(i) Yang Arif Pesuruhjaya Kehakiman Mahkamah Tinggi telah silap dari segi fakta dan undang-undang kerana membuat kesilapan membenarkan pintu bilik dikunci dari luar.

(ii) Yang Arif Pesuruhjaya Kehakiman Mahkamah Tinggi telah silap dari segi fakta dan undang-undang kerana mempercayai keterangan Pasukan polis yang membuat serbuan SP4 SP9 memberi keterangan palsu dan tidak menimbang langsung keterangan SP2 jurufoto.

(iii) Yang Arif Pesuruhjaya Penghakiman Tinggi telah silap dari segi fakta dan undang-undang kerana menerima pakai keterangan SP5 seorang pegawai sains dan bukan seorang ahli kimia kerajaan.

(iv) Yang Arif Pesuruhjaya Penghakiman telah silap dari segi fakta dan undang undang kerana memutuskan yang perayu mempunyai 'possession custody control dan occupier' bersangkut barang kes yang dijumpai.

(v) Yang Arif Pesuruhjaya Penghakiman telah silap dari segi fakta dan undang-undang kerana memutuskan ada kes prima facie atas perayu dan memanggil perayu membela diri.

(vi) Yang Arif Pesuruhjaya Penghakiman telah silap dari segi fakta dan undang-undang kerana memutuskan perayu bersalah dalam kes ini.

(vii) Yang Arif Pesuruhjaya Penghakiman telah silap dari segi fakta dan undang-undang kerana tidak menimbangkan yang PW13 sebenarnya pengedar dalam kes ini.

(viii) Untuk kesemua atau mana-mana satu alasan yang dicatit di atas perayu memohon rayuannya dibenarkan dan hukuman diketepikan.

[5] Learned counsel for the appellant relied, inter alia, on the following cases to drive home the point namely:

(a) *Public Prosecutor v Yap Boon Chang* [1992] 2 CLJ 1257;

(b) *Yap Chin Chai v Public Prosecutor* [2011] 2 MLJ 632; [2010] 4 CLJ 693/697;

(c) *Lee Chee Meng v Public Prosecutor* [1992] 1 MLJ 322;

(d) *Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585;

(e) *Public Prosecutor v Kau Joo Huat* [1988] 2 MLJ 91;

(f) *Public Prosecutor v Chong Wei Kian* [1990] 3 MLJ 165; and

(g) *Public Prosecutor v Lin Lian Chen* [1991] 1 MLJ 316.

[6] In the instant case a pertinent question of law was raised. The chemist's report was tendered as exh P13 by SP5, Marwani bt Abdul Rahman whose status is referred to as 'Pegawai Sains, Jabatan Kimia' and that report which states that it is a report under s 399 of the Criminal Procedure Code ('CPC') does not satisfy the criteria required under the said section, (see *Public Prosecutor v Lin Lian Chen*). Despite the objection of the defence the said report was marked as exhibit. Learned deputy public prosecutor before us argues that it can be admitted pursuant to s 45 of the Evidence Act 1950 ('EA 1950'), if at all it cannot be admitted under s 399 of the CPC. Both the counsels were not able to furnish us with authorities in support of their contentions and in consequence the judgment was reserved. Exhibit P13, inter alia, reads as follows:

JABATAN KIMIA MALAYSIA

Kementerian Sains, Teknologi dan Inovasi

No. Makmal: (PP) FOR 3586/08-0

LAPORAN DIBAWAH SEKSYEN 399 KANUN TATACARA JENAYAH

Saya MAWARNI BINTI ABDUL RAHMAN, Pegawai Sains yang berkhidmat di Jabatan Kimia Malayia dengan ini memperakui bahawa pada jam 0930 pada 12/12/2008 telah diserahkan kepada saya oleh Ahli Kimia ROSNI BINTI HAMID, satu bungkusan kota bertanda '(E)' yang termeterai 'POLIS DIRAJA MALAYSIA 40' yang terlebih dahulu diterima oleh beliau daripada C/Insp. 14386 Salim bin Emin pada jam 1535 pada 28/11/2008.

Saya telah memeriksa bungkusan '(E)' itu dan mendapati di dalamnya sebuah kotak berisi 14 bungkusan plastic bertanda 'SI' hingga 'S14'. Di dalam setiap bungkusan plastik itu ada satu bongkah bahan tumbuhan mampat. Setelah dianalisa, saya dapati kesemua bahan tumbuhan tersebut ialah 'cannabis'.

Berat bersih tumbuhan 'cannabis' tersebut ialah seperti berikut:

Bil.	Tanda	Berat Bersih (gram)
1.	S1	702
2.	S2	801
3.	S3	544
4.-14	S4 hingga S14	…
	JUMLAH	9623

t.t.

…

MAWARNI BINTI ABDUL RAHMAN

Pegawai Sains

Jabatan Kimia Malaysia

[7] Section 399 of the CPC reads as follows:

(1) Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) upon any person, matter or thing or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any inquiry, trial or other proceeding under this Code unless that person or Registrar shall be required to attend as a witness:

(a) by the Court; or

(b) by the accused in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:

Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy of it to the accused not less than ten clear days before the commencement of the trial.

(2) The following are persons to whom the provisions of this section apply:

(a) officer of the Institute for Medical Research;

(b) Government Medical Officers;

(c) chemists in the employment of any Government in Malaysia or of the Government of Singapore;

(d) any person appointed by the Minister by notification in the Gazette, to be a Document Examiner;

(e) Inspector of Weights and Measures appointed as such under any written law relating to weights and measures in force in Malaysia; and

(f) any person or class of persons to whom the Minister by notification in the Gazette declares that the provisions of this section shall apply.

(3) The persons referred to in subsection (2) and the Registrar of Criminals are by this Code bound to state the truth in reports made under their hands.

[8] In the instant case it is not in dispute that s 399 (2)(c) is the relevant part

and the prosecution concedes that SP5 is not a chemist and the evidence of SP5 also clearly shows that she is not a chemist. That part of the evidence reads as follows:

T.P.R. Kenapa awak digelar sebagai Pegawai Sains tapi bukan Ahli Kimia?

SP5 : Saya bertugas sebagai Pegawai Sains kerana saya memiliki Ijazah Sarjana Muda dengan kepujian dalam bidang sains forensic dari Universiti Sains Malaysia (USM) tahun 2005. Sebagai pegawai sains yang memiliki gelaran Ahli Kimia mereka memiliki Ijazah Sarjana Muda dalam bidang kimia dan berdaftar dengan Institut Kimia.

T.P.R. Walaupun awak tidak bergelar Ahli Kimia dan tidak memiliki Ijazah Sarjana Muda dalam bidang kimia serta tidak berdaftar dengan Institut Kimia adakah awak dibenarkan menjalankan analisa ke atas dadah?

SP5 : Saya dibenarkan menjalankan analisa ke atas bahan-bahan yang disyaki mengandungi dadah, tugas Pegawai Sains dan Ahli Kimia adalah sama, yang membezakan ialah Ahli Kimia berdaftar dengan IKM tetapi Pegawai Sains tidak berdaftar dengan IKM. IKM ialah Institut Kimia Malaysia.

[9] From the evidence of SP5 it is clear that she is not a government chemist though her function relates to the work of the chemist. In essence if the report is not from the government chemist it is not admissible and has no relevance for purpose of s 399 of the CPC even though it was couched as a report under s 399 of the CPC. Support for the proposition is found in a number of cases in India, even though there is no equipollent section such as s 399 of the CPC in India. Section 293 of Indian Criminal Code which deals with similar issues, and the commentary to the said section by the learned author of Ratanlal & Dhirajlal, (13th Ed), 1987 to *The Code of Criminal Procedure* at p 304 reads as follows:

> This section makes provision for accepting in evidence reports made by certain Government Scientific Experts. It applies to the report of a 'Chemical Examiner or Assistant Chemical Examiner'. It does not extend to the report made by an Additional Chemical Examiner [Atul Muchi, (1984) 10 Cal 1026], or the Professor of Anatomy at the Government Medical College. [Ahilya (1922) 24 Bom LR 803, 47 Bom 74].

[10] The learned deputy public prosecutor's argument that exh P13 can be admitted under s 45 of the EA 1950 cannot be sustained as it is trite that if a special procedure is prescribed under the Act then the general provisions found in the Act or other Acts cannot be followed. This principle is expressed by the maxim *genaralia specialibus non derogant* (see *Public Prosecutor v Sandara Margaret Birch* [1977] 1 MLJ 129; *Baldeo and Others v Emperor* 1940 AIR All 263; article by Hamid Sultan bin Abu Backer — *Md Desa bin Hashim v Public Prosecutor* [1995] 3 MLJ 350 — A classic display of judicial vigilance [1997] 1 MLJ LXXXIII]. The courts in India have gone to the extent of saying that if the

report does not comply with the said section then for purpose of admissibility it is nothing more than a 'little scrap paper… it is not legal evidence' (see *Peare Lal v Emperor* AIR 1934 All 853). In essence the court is not bound to accept and act on such report as conclusive evidence of its contents, (see *Bhaskaran Pillai (N) v State,* (1969) 1 LLJ 642 Ker).

[11] In the instant case the evidence of SP5 and also his report exh P13 has to be expunged. Once it has been expunged the prosecution case would have collapsed at the prosecution stage as the elements of the charge would not have been established and the accused had to be acquitted and discharged.

MERITS

[12] In the instant case the petition of appeal except on the issue of s 399 relates to one of finding of facts. The learned JC has meticulously dealt with the issues raised in the petition of appeal where relevant and material to justify conviction and sentence according to law. We do not think it is necessary to set out the facts in any detail and the findings of the learned JC save to deal with the core issues.

[13] On the first ground relating to door being locked, the learned JC has dealt in his judgment and made the following observations:

> Mengikut logik, jika pintu bilik telah dikunci dari luar, tentulah tidak ada orang di dalamnya dan tidak begitu cemas untuk SP4 dan anggotanya memberi fokus terlebih dahulu ke atas bilik tersebut dan lebih pragmatik bagi mereka terus menggeledah bahagian lain rumah terlebih dahulu.

[14] Second and seventh grounds are also in relation to finding of facts, which is based on evidence. The other grounds namely fourth, fifth and sixth are decisions according to law based on primary facts and findings of the learned JC.

[15] In the instant case 13 witnesses had given evidence for the prosecution. The appellant was found in the room not wearing any clothes except pants. When PW4 identified himself as police, he panicked and tried to flee. He was apprehended and drugs (*ganja*) were recovered from the room. The learned DPP has dealt in the submission and have dealt with the issues raised by the appellant in the petition of appeal. We are in total agreement except on the issue relating to s 399 of the CPC.

[16] In the instant case, we have carefully examined the complaints, the judgment and the evidence save for the s 399 issue, we are satisfied that the learned trial judge has not misdirected himself as averred in the petition of

appeal. In the instant case we are satisfied that the learned JC had directed his mind to the relevant issues and had acted in accordance with the law with the full cognisance of the maximum evaluation and beyond reasonable doubt test as propounded by case laws, (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281).

[17] After having given much consideration to the submission of the learned deputy public prosecutor, we take the view that it is fit and proper case to allow the appeal solely on the issue of s 399 of the CPC and we would like to make it clear that we would have dismissed the appeal on merits. In consequence the appeal is allowed. The order of conviction and sentence of the High Court is set aside. The accused is acquitted and discharged.

[18] We hereby order so.

Appeal allowed; appellant discharged and acquitted.

Reported by Afiq Mohamad Noor